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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER PAN,

Defendant and Appellant.

B259666

(Los Angeles County  
Super. Ct. No. KA103037)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Reversed.

Jasmine Patel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Allison H. Chung, and Esther Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Christopher Pan appeals from a judgment of conviction entered after a jury found him guilty of second degree commercial burglary (Pen. Code,<sup>1</sup> § 459) and identity theft (§ 530.5, subd. (a)). As to both counts, the trial court suspended imposition of sentence and placed defendant on probation for a period of three years, conditioned on service of 365 days in county jail. Defendant appeals, raising claims of a discovery violation, evidentiary error, prosecutorial misconduct, and sentencing error. We reverse.

## FACTS

The following evidence was introduced during the trial of defendant. On August 30, 2013, Jeffrey Bertoli received an email from Marriott, from whom he had a Marriott Rewards Visa Card. The email confirmed a reservation in defendant's name at a Courtyard by Marriott in Hacienda Heights near Bertoli's home. Bertoli did not know defendant, had not made the reservation for defendant, and had not given defendant or anyone else permission to make the reservation using his rewards points. Earlier that month, Bertoli had noticed that he was receiving less mail than usual in his mailbox.

Bertoli telephoned the Courtyard by Marriott in Hacienda Heights and notified the general manager, Maritza Mejia, that his identity had recently been stolen, he had not made the reservation, and if someone tried to check into the hotel using the reservation, she should notify the police. At about 3:00 p.m., shortly after Bertoli spoke to Mejia, defendant walked up to the front desk and attempted to check in using the reservation.<sup>2</sup> Defendant gave Mejia his identification and a Visa card bearing his name. Visa cards

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> Although Mejia testified that defendant walked into the hotel through the front doors, hotel surveillance video showed defendant walking to the front desk from another direction.

start with the number 4, and the card defendant gave Mejia started with the number 5, alerting Mejia that it might be fraudulent. When she swiped the card, it came back as invalid. She asked for a different form of payment, and defendant handed her another Visa card. Although the number looked proper, it too came back as invalid.

When Mejia told defendant that she was unable to get authorization for payment on the card, he responded that the reservation had already been paid for. Mejia told defendant that she still needed a credit card as a deposit. Mejia testified, “[s]o specifically it happened when I turned away the second form of payment, he said, his words I remember was, the reservation that I made was already paid for. And that’s when I said, I understand; however, I still need a form of payment as a deposit to cover incidentals.”

Defendant walked away from the front desk and walked toward the interior of the hotel rather than the front doors. Saira Saucedo, the operations supervisor for the Marriott, followed defendant. Defendant walked up the stairs to the second floor and went to room 224. He knocked on the door and was admitted by an occupant. About five minutes later, he came out of the room and left by an exit stairway. Saucedo radioed the front desk and determined that defendant had not returned there. Saucedo returned to the front desk and told Mejia about defendant’s actions. Mejia immediately called law enforcement.

Los Angeles County Sheriff’s Deputies Gordon Baker and Herbert James arrived at the hotel at about 4:00 p.m., and Mejia directed them to room 224. When they entered the room, they noticed a strong odor of acetone, which is commonly used to “wash” ink from checks, coming from the bathroom. There was a plate that smelled of acetone in the bathroom, a pair of tweezers on the plate, and a check in the toilet. The ink from the “pay to order of” line was beginning to fade, which an officer testified was consistent with the check being “washed” in acetone.

Inside the hotel room, the deputies found a bottle of acetone, a printer/scanner that had a birth certificate laying face down on the glass of the printer/scanner, computer equipment, unopened packages of expensive cellular telephones, other birth certificates,

passports, and other documents containing identifying information for various individuals. Inside a tissue box, the deputies found Bertoli's Marriott Rewards Visa Card, two credit cards belonging to Bertoli's wife, and various identification documents. The deputies also found a vehicle registration in defendant's name with an address that was different from the address on defendant's driver's license. Based on the items found in the room, Deputy Baker believed it had been set up as a "forgery shop," with more than one person involved in its operation.

The deputies arrested Aaron Gomez and Joseph Lopez, who were present in room 224 when officers arrived, for identity theft and other crimes, including theft of Bertoli's identifying information. A second reservation also had been made for Lopez using Bertoli's rewards account, and a confirmation email had been sent to Bertoli's email address. No one tried to check in using that reservation. Bertoli did not know Lopez and had not given Lopez permission to use his rewards points.

## **DISCUSSION**

As one of his claims of error on appeal, defendant contends that several statements made by the prosecutor during closing argument constituted misconduct, violating defendant's federal due process rights. While we do not conclude the challenged statements constitute a pattern of misconduct so egregious as to violate defendant's federal due process rights, we do conclude the statements were deceptive and that there is a reasonable likelihood the statements may have been applied by the jury in an erroneous manner.

### **A. *Proceedings Below***

During the prosecutor's closing argument, the prosecutor went over the elements of each charge, then argued the following to the jury:

"Now we come to the burden of proof. My burden is beyond a reasonable doubt. . . . The reasonable doubt proof is that proof that leaves you with an abiding

conviction that the charge is true. It doesn't mean that you've eliminated all possible doubt. It means that if you have a reasonable doubt, if you're using your common sense and things just don't jive, then perhaps I didn't meet my burden. However, if you're using your common sense and all the faculties that you've been given, when you look at the evidence, you take everything together, and then you decide if looking at this again today, tomorrow, or the next day, you'll be coming to the same conclusion, then you're finished. If you believe that the defendant is guilty after looking at all the evidence and thinking about it logically with common sense, then you're done."

At this point, defense counsel objected, asserting as the ground misstatement of the law. The trial court overruled the objection.

Later in her argument, the prosecutor stated, "Ladies and gentlemen, you will have an ample opportunity to look at all of the exhibits that have been marked into evidence. After you reviewed everything and had an opportunity to discuss with each other and deliberate, as you promised to do, and use your common sense, because if you don't, then there's no way you can come up and hold me to my standard of reasonable doubt. Remember, if you think that any possible doubt can eradicate a verdict of guilt, take a step back and just use your common sense. You've been on this earth long enough to know that these things don't jive. People don't just walk into hotels using other people's information, using cards that return invalid, knowing their way around a hotel that they were refused check in."

Defendant did not object to these statements.

During defendant's closing argument, defense counsel stated, "the government[] has the burden of proof. Not 51 percent, beyond a reasonable doubt. And in that instruction package the judge gave you, you're going to read that. Read it carefully." Defense counsel also argued, "If there's two reasonable alternatives under circumstantial evidence, two reasonable interpretations, one pointing to innocence, one pointing to guilt, you must adopt the one that points to innocence. I'm going to show you that instruction. My point is, is it reasonable that Aaron Gomez or Joseph Lopez made this reservation,

told their friend Mr. Pan, there's a hotel reservation for you[?] It's under your name. Go check in. Is that reasonable? And it is."

The prosecutor objected to the defense counsel's argument as misstating the testimony and as counsel testifying. The trial court overruled the objection.

In her rebuttal closing argument, the prosecutor argued that the logical thing to do when two credit cards are rejected for a room reserved by another person is to call the person making the reservation. She then commented on the defense's failure to call a witness to testify that he or she made the reservation on defendant's behalf, stating, "[defense counsel is] obligated to present any evidence he has that would help his client. So don't you think that if somebody else invited him to the hotel, that that person would have come before you to say, I invited that person to the hotel."

When defendant objected to these statements as improper argument, the trial court overruled the objection. The prosecution continued, "That's the logical thing. That's the reasonable thing. And reasonable is the standard you need to hold me to. That's my burden. That's what's reasonable. But there's no evidence that anybody invited him into the room. There's no evidence that he ever claimed he didn't know how that room was being paid for. . . . Who acts that way, ladies and gentlemen? If someone gifts you a room, you don't walk into a hotel acting like you made the reservation yourself. That's not reasonable. My standard is reasonable. You have to hold me to a reasonable doubt. That's not reasonable. You can't expect someone who has been invited into a room, gifted hotel points, to act like it's their reservation. You can't expect that from any reasonable person."

The prosecution concluded that "the burden here is reasonable doubt. That means you have to use everything that was given to you and your common sense and make sure that any inference you make is reasonable. If there were people to say, I invited [defendant] to the hotel, rest assured that [defense counsel] in his competent and diligent representation would have made sure they made it before you to speak and have you listen to them."

Defense counsel objected. At sidebar, the court questioned the prosecutor whether she was referring to Gomez and Lopez when raising the failure to call logical witnesses and concluded that both witnesses had Fifth Amendment rights against self-incrimination, which prevented the defense from being able to call them. The trial court admonished the jury, “Mr. Gomez and Mr. Lopez cannot be compelled to testify. They have certain rights, including Fifth Amendment rights, therefore they are out of the reach of [defense counsel]. He could not have brought them into court. The court just offers that as an explanation or as a clarification of the objection that was made by [defense counsel].”

B. *Applicable Law*

Counsel during closing argument are given significant leeway to discuss the legal and factual merits of a case. (*People v. Centeno* (2014) 60 Cal.4th 659, 666.) “A prosecutor may fairly comment on and argue any reasonable inferences from the evidence.” (*People v. Woods* (2006) 146 Cal.App.4th 106, 112.) A prosecutor also may comment on the ““state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citations.]” [Citations.]” (*People v. Lewis* (2009) 46 Cal.4th 1255, 1304, quoting *People v. Vargas* (1973) 9 Cal.3d 470, 475). While a comment on the defendant’s exercise of the Fifth Amendment privilege against self-incrimination is prohibited (*see Griffin v. California* (1965) 380 U.S. 609, 614 [85 S.Ct. 1229, 14 L.Ed.2d 106]), there is no similar bar to commenting on a defendant’s failure to call a logical witness who holds such a privilege, such as an accomplice. (See *People v. Ford* (1988) 45 Cal.3d 431, 447.)<sup>3</sup> It is also permissible for a prosecutor to urge the jurors to use their “common sense” and experience when evaluating the weight

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<sup>3</sup> Recognizing, however, that certain applications of the rule permitting comment on the failure to call logical witnesses could be criticized where the reason for such failure is ambiguous, the Supreme Court has stated, “the trial court [has] discretion to determine when the circumstances of the case are such that comment is not permissible.” (*People v. Ford, supra*, 45 Cal.3d at p. 447.)

of all of the evidence presented during trial, consistent with their role under the law as factfinders. (*People v. Venegas* (1998) 18 Cal.4th 47, 80 [“jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them”]; *People v. Rich* (1988) 45 Cal.3d 1036, 1091 [no misconduct where prosecutor’s remarks on psychiatric evidence were for the purpose of encouraging the jury to “‘use [its] own common sense’”]); see also CALCRIM No. 226 [“In deciding whether testimony is true and accurate, use your common sense and experience”].)

However, it is improper for counsel to misstate the law and, in particular, for a prosecutor to attempt to absolve the prosecution of its burden at trial of proving each element of an offense beyond a reasonable doubt. (*People v. Cortez* (2016) 63 Cal.4th 101, 130; see also *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) It is also improper to shift the burden of proof or persuasion to the defense by asserting that the defense has an “obligation” to call witnesses. (*People v. Woods, supra*, 146 Cal.App.4th at p. 113.)

A prosecutor’s “[i]mproper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” (*People v. Cortez, supra*, 63 Cal.4th at p. 130.) “Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” (*Ibid.*)

“To establish misconduct, a defendant need not show that the prosecutor acted in bad faith.” (*People v. Cortez, supra*, 63 Cal.4th at p. 130.) Instead, when the defendant challenges statements made by the prosecutor before the jury, the defendant must show “[i]n the context of the whole argument and the instructions’ [citation], there was ‘a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. . . .’ [Citation.]” (*People v. Centeno, supra*, 60 Cal.4th at p. 667.) “If the challenged comments, viewed in context, ‘would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.’ [Citation.]” (*Cortez, supra*, at p. 130.) “In conducting this inquiry, we



“do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]’ [Citation.]” (*Centeno, supra*, at p. 667.)

C. *Defendant Has Not Forfeited His Claims of Prosecutorial Misconduct*

As an initial matter, the People contend that defendant forfeited certain of his claims of prosecutorial misconduct on appeal by failing to contemporaneously object in the trial court to such statements and request an admonition or curative instruction. From our review of the record, we disagree.

Generally, a defendant may not complain of prosecutorial misconduct on appeal unless the defendant raised a timely objection in the trial court on that ground and requested that the jury be admonished to disregard the impropriety. (*People v. Centeno, supra*, 60 Cal.4th at p. 674; *People v. Hill* (1998) 17 Cal.4th 800, 820.) The failure to request the jury be admonished does not preclude appellate review, however, if ““the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.”” [Citations.]” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328-1329.) A defendant’s failure to object and request an admonition also will be excused if such an objection would have been futile or the admonition would not have cured the harm. (*Ibid.*)

Here, as discussed below, as to the prosecutor’s statements concerning her burden of proof and persuasion, we conclude the defense timely objected. The trial court, however, overruled the defense’s objection, effectively precluding defendant from being able to request the jury be admonished or that a curative instruction be given. We will thus consider the merits of defendant’s prosecutorial misconduct arguments.

D. *The Prosecutor Committed Misconduct*

In this case, we conclude the prosecutor committed misconduct in making statements that equated reasonable doubt with the jurors’ common sense belief. For example, the prosecutor stated in closing argument that the jury’s role was “done” if they

“believe[d] that the defendant was guilty after looking at all the evidence and thinking about it logically with common sense . . . .” The prosecutor also told the jury, “if you think that any possible doubt can eradicate a verdict of guilt, take a step back and just use your common sense.” Although it is true that the jurors may rely on their common sense and experience in evaluating the evidence, the prosecutor’s statements substantially lessened the reasonable doubt standard by suggesting the jurors’ common sense belief in the defendant’s guilt was sufficient to satisfy the People’s burden of proof. Moreover, when the defense immediately objected to the prosecutor’s initial statement equating their common sense with the reasonable doubt standard, the court overruled the objection, suggesting to the jury that the prosecutor’s statement was a correct statement of the law.

We also find misconduct in the prosecutor’s statement concerning the defense’s obligation to produce the witness or witnesses who purportedly invited defendant to the hotel. Specifically, the prosecutor stated that “[defense counsel is] obligated to present any evidence he has that would help his client. So don’t you think that if somebody else invited him to the hotel, that that person would have come before you to say, I invited that person to the hotel.” Defense counsel’s objection to this statement was overruled. Although it was permissible for the prosecutor to comment on the defense’s failure to call logical witnesses,<sup>4</sup> it was error for the prosecutor to argue that the defense counsel was obligated to present any evidence.

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<sup>4</sup> The trial court determined the logical witnesses referred to by the prosecutor were Lopez and Gomez, the two individuals located in room 224, but that they could not be called by the defense due to these witnesses’ Fifth Amendment privilege against self-incrimination. As recognized in *Ford*, however, that these individuals were defendant’s alleged accomplices and could have claimed the privilege against self-incrimination did not necessarily preclude them from being called as witnesses. (See *People v. Ford*, *supra*, 45 Cal.3d at p. 447 [holding that it was constitutionally permissible for the prosecution to comment on the defendant’s failure to call logical accomplices or codefendant witnesses who had not actually exercised their privilege against self-incrimination].)

In *People v. Woods*, *supra*, 146 Cal.App.4th 106, the prosecutor, in response to the defense's argument that an investigating officer's testimony was not credible, argued that that defense had not called any witnesses to testify that the officer was doing his job improperly and further argued that the defense counsel was "'obligated to put the evidence on from that witness stand.'" When the defense counsel objected and stated that she was not obligated to do anything, the court overruled the objection. (*Id.* at p. 112.) On appeal, the court held that the prosecutor's assertion in closing argument "that the defense had an 'obligation' to present evidence expressly and erroneously advised the jury that [the defendant] bore some burden of proof or persuasion." (*Id.* at p. 113.) Further, the court held that when the trial court overruled the defense's objection, it implied that the "'obligation'" to which the prosecutor referred actually existed and that it was thus "inconceivable that the jury would understand this uncorrected, implicitly approved statement to mean anything other than [the defendant] carried a burden of proof or production." (*Ibid.*)

Similarly, here, the prosecution's statement did not simply comment on the defense's failure to call logical witnesses. Instead, the prosecutor's statement erroneously advised the jury that the defense was obligated to present evidence, which, in turn, suggested that the prosecution's burden of proof was satisfied if the defense failed to produce sufficient evidence. Because the statement impermissibly shifted the burden of proof to the defense by suggesting that deficiencies in the defense's case were sufficient to make up for any shortcomings in the People's proof, it was misconduct. (See *People v. Centeno*, *supra*, 60 Cal.4th at p. 673 ["It is . . . error to state that 'a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence'"]; see also *People v. Hill*, *supra*, 17 Cal.4th at p. 831 [holding the prosecutor committed misconduct insofar as her statement that "'[t]here has to be some evidence on which to base a doubt'" "could reasonably be interpreted as suggesting to the jury she did not have the burden of proving every element of the crimes charged beyond a reasonable doubt"], italics omitted.) Moreover, the error was compounded by the trial court overruling the defendant's objection to the prosecutor's statements, which

precluded the defense from requesting an admonition to correct the prosecutor's misstatement and suggested to the jury that the prosecution's erroneous statement was valid. (*See People v. Woods, supra*, 146 Cal.App.4th at p. 113.)

Thereafter, in the remainder of the prosecutor's rebuttal argument, the prosecutor repeatedly stated to the jury that the applicable standard to which the People should be held and its burden of proof is "reasonable." The high court has stressed, however, that equating the prosecution's burden of proof with a decision of guilt that is merely "reasonable" is error.

Specifically, in *People v. Centeno, supra*, 60 Cal.4th 659, the Supreme Court addressed a similar claim of prosecutorial misconduct where the prosecutor "argued that [the] defendant's testimony was unreasonable, and conversely that the People's burden was met if its theory was 'reasonable' in light of the facts supporting it." (*People v. Centeno, supra*, 60 Cal.4th at p. 664.) When reviewing the prosecutor's statements, the Supreme Court observed that "[i]t is permissible to argue that the jury may reject impossible or unreasonable interpretations of the evidence and to so characterize a defense theory. (See, e.g., CALCRIM Nos. 224, 226.)" (*Id.* at p. 672.) It explained, "[s]etting aside the incredible and unreasonable, the jury evaluates the evidence it deems worthy of consideration. It determines just what that evidence establishes and how much confidence it has in that determination. The standard of proof is a measure of the jury's level of confidence. It is not sufficient that the jury simply believe that a conclusion is reasonable. It must be convinced that all necessary facts have been proven beyond a reasonable doubt." (*Ibid.*)

The Supreme Court stated, however, that the prosecutor's arguments left the jury with the impression that the prosecution could meet its burden so long as its interpretation of the evidence was reasonable. (*People v. Centeno, supra*, 60 Cal.4th at p. 672.) The court explained, "it is error for the prosecutor to suggest that a 'reasonable' account of the evidence *satisfies the prosecutor's burden of proof*." (*Ibid.*) The court concluded, "the prosecutor did not simply urge the jury to "accept the reasonable and reject the unreasonable"" in evaluating the evidence before it. [Citation.] Rather, she confounded

the concept of rejecting unreasonable inferences with the standard of proof beyond a reasonable doubt. She repeatedly suggested that the jury could *find defendant guilty* based on a ‘reasonable’ account of the evidence. These remarks clearly diluted the People’s burden.” (*Id.* at p. 673.) The court found it reasonably likely that this and other portions of the prosecutor’s argument misled the jury as to the prosecutor’s burden of proof and the way in which the jury should approach its task. (*Id.* at p. 674.)

In the instant case, the prosecutor’s challenged statements are substantially similar to the prosecutor’s arguments in *Centeno*. Here, the prosecutor “did not simply urge the jury to “accept the reasonable and reject the unreasonable” in evaluating the evidence before it.” Instead, the prosecutor repeatedly stated during her rebuttal argument that the standard and the People’s burden of proof was “reasonable.” Such arguments substantially diluted the People’s burden by suggesting to the jurors that they could find defendant guilty simply if they believed it was reasonable that he committed the crime, rather than requiring them to be convinced that the prosecution had proven all necessary facts beyond a reasonable doubt. (*People v. Centeno, supra*, 60 Cal.4th at p. 673.)

Although, viewed in the context of the whole argument, we do not conclude that the various misstatements constituted a pattern of conduct so egregious as to violate defendant’s federal due process rights, we do note that the instances of erroneous statements were not isolated or brief and were deceptive. (Compare *People v. Hill, supra*, 17 Cal.4th at p. 818 [finding “the prosecutor committed constant and egregious misconduct” during both the guilt and penalty phases of the defendant’s trial and that the combined prejudicial effect of the misconduct and other errors violated the defendant’s right to a fair trial].)

#### E. *The Errors Were Not Harmless*

Viewing the challenged statements in the context of the whole argument and the court’s instructions, we conclude there was a reasonable likelihood the jury was misled about the applicable burden of proof.

In *Centeno*, in assessing prejudice,<sup>5</sup> the Supreme Court noted “the trial court correctly instructed the jury on the presumption of innocence, reasonable doubt, and the prosecutor’s burden of proof” before closing arguments. (*People v. Centeno, supra*, 60 Cal.4th at p. 676.) The court further noted that “arguments of counsel ‘generally carry less weight with a jury than do instructions from the court’” and that “[w]hen argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former . . . .” (*Ibid.*) However, the court concluded, “[g]iven the closeness of the case and the lack of any corrective action” by the trial court after the challenged statements were made, “there is a reasonable probability that the prosecutor’s argument caused one or more jurors to convict [the] defendant based on a lesser standard than proof beyond a reasonable doubt.” (*Id.* at p. 677.) The court thus reversed the convictions. (*Ibid.*)

Here, as in *Centeno*, the record reflects the trial court properly instructed the jury on reasonable doubt before closing arguments.<sup>6</sup> However, thereafter the prosecution repeatedly misstated the law regarding the People’s burden of proof. Moreover, when the defense counsel objected to the prosecutor’s misstatements, the trial court overruled the

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<sup>5</sup> The Supreme Court assessed the defendant’s claim of prejudice in the context of the defendant’s ineffective assistance of counsel claim for his counsel’s failure to object at trial to the prosecutor’s alleged misconduct during closing argument. (*People v. Centeno, supra*, 60 Cal.4th at p. 676.)

<sup>6</sup> Regarding reasonable doubt, the court read the following instruction in pertinent part: “A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove the defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all of the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.”

objections. Therefore, the prosecutor's misstatements in her closing and rebuttal arguments were the last explanations of the burden of proof that the jury heard prior to beginning deliberations.

Further, because the court overruled the defense's objections and consequently did not admonish the jury that it should follow the court's instructions rather than any conflicting statements of the law advanced by the attorneys, the trial court effectively validated the prosecutor's erroneous statements regarding the burden of proof. (See *People v. Woods, supra*, 146 Cal.App.4th at p. 118.) We therefore cannot presume that the jury followed the court's instructions and disregarded the prosecutor's subsequent misstatements of the law.

Additionally, as in the *Centeno* case, this was a close case. Although there was substantial evidence that victim Bertoli's identity had been stolen and there was a substantial amount of evidence of identity theft located in room 224 of the hotel, the evidence of defendant's knowledge and intent was not overwhelming. To demonstrate defendant's knowledge and intent, the prosecution relied primarily on defendant's act of attempting to check in to the hotel room and the testimony of the hotel front desk manager, Mejia, who testified for the first time during the trial that defendant essentially told her that he had made the reservation for the hotel room. This testimony, however, was inconsistent with Mejia's testimony during defendant's preliminary hearing. Further, Mejia testified that she never told anyone but the prosecutor what defendant had said, and the prosecutor failed to disclose this information to the defense prior to Mejia testifying during the trial.

There was also evidence presented to the jury that Lopez and Gomez were in the hotel room at the time defendant attempted to check in and that a second reservation had been made under Lopez's name. Defense counsel argued that one of the other individuals could have made the fraudulent reservation and invited defendant to the hotel room. It was thus left to the jury to evaluate the evidence, determine the credibility of the People's witnesses, and determine whether the People had satisfied their burden of proof. Given the prosecutor's numerous misleading statements regarding the People's burden of

proof and the trial court's failure to correct them, we conclude that there is a reasonable likelihood that the jurors understood or applied the statements in an improper or erroneous manner to improperly lower or shift to the defense the People's burden of proof.<sup>7</sup>

### **DISPOSITION**

The judgment is reversed.

GARNETT, J.\*

We concur:

ZELON, Acting P. J.

SEGAL, J.

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<sup>7</sup> Given our conclusion, we need not address the remainder of defendant's arguments on appeal.

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.